

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re BARRY LAMONT RUFFIN,)	Case No. 05-65085
)	
Debtor.)	
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MEMORANDUM

This matter comes before the court on a motion to dismiss this case by the chapter 13 trustee. This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). Accordingly, this court may render a final order.

For the reasons stated below, this case will be dismissed.

Facts

On October 26, 2005, the Barry Lamont Ruffin (“the Debtor”) met with his attorney. At that meeting, he was given a list of credit counselors. Twenty days later, on November 15, 2006, the Debtor filed a chapter 13 petition. The debtors checked the box on their petition stating:

“I/we request a waiver of the requirement to obtain budget and credit counseling prior to filing based on exigent circumstances. (Must attach certification describing.)”

The Debtor did not file a certificate describing the exigent circumstances until 44 days after he filed his petition.

On November 16, 2005, the Clerk of the Court filed a notice of a hearing on this matter for January 4, 2006. On December 28, 2005, the chapter 13 trustee filed an opposition to the debtor's request for waiver of credit counseling requirement and request for dismissal. On January 3, 2006, the chapter 13 trustee also filed a brief in support of the opposition.

On December 29, 2005, the debtor filed a supplement to his request for waiver of credit counseling. The debtor has not, as of the date of the hearing on this matter, filed a certificate stating that he has completed counseling as described below.

Law

The Bankruptcy Code, as amended on October 17, 2005, provides that a debtor must receive credit counseling within 180 days of the date of petition in order to be eligible to file a petition under the Bankruptcy Code. 11 U.S.C. § 109(h)(1)¹. An individual debtor is required to file with the court (1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under Section 109(h) describing the services provided to the debtor and (2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency ("the Certificate of Completion of Counseling"). 11 U.S.C. § 521(b).

¹ Section 109(h)(1) provides:

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

The Amended Bankruptcy Code provides three circumstances² in which a debtor is not required to file a Certificate of Completion of Counseling with his or her petition. Only the second exception is relevant to this discussion.³ The second exception provides that the debtor may obtain credit counseling during the first 30-day period post-petition *if* he or she files a certificate (“Certificate in Support of Temporary Waiver of Completion of Counseling”) *that is satisfactory to the court* that (I) describes exigent circumstances that merit a waiver of the

² Section 109(h)(2)-(4) provides.

(2) (A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3) (A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

³The first exception provides that Paragraph 109(h)(1) does not apply in a district in which the United States Trustee has determined that no qualified nonprofit budget and credit counseling agency is available, including by internet or telephone. See 11 U.S.C. § 109(h)(2). The third exception is extended to a debtor who is unable to complete the requirement of Paragraph 109(h)(1) because of incapacity, disability or active military duty in a military combat zone. See 11 U.S.C. § 109(h)(4).

requirement of Section 109(h)(1), and (II) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain such counseling during the 5-day period beginning on the date on which the debtor made that request. 11 U.S.C. § 109(h)(3).

The Certificate in Support of Temporary Waiver of Completion of Counseling must be filed with the petition. That certificate must contain two statements. In the first statement, the debtor must describe the exigent circumstances that merit a waiver of the credit-counseling requirement. In the second statement, the debtor must certify that he or she attempted to obtain counseling, but was told that it would not be available for five days from the date of the request.

If a debtor indicates on his or her petition that he or she is requesting a waiver and if he or she files Certificate in Support of Temporary Waiver of Completion of Counseling, then the debtor may obtain credit counseling within the first thirty days⁴ post-petition if the Court is satisfied that the described circumstances constitute exigent circumstances. Upon the completion of credit counseling, the debtor must file a Certificate of Completion of Counseling.

To summarize, in order to be eligible to file a bankruptcy petition, an individual debtor must:

- Receive an individual or group briefing that outlines the opportunities for available credit counseling, and provides assistance in performing a related budget analysis, from an approved nonprofit budget and credit counseling agency during the 180-day period pre-petition,

and

⁴ The court may extend the deadline for completing counseling by an additional fifteen days for cause. 11 U.S.C. § 109(h)(3)(B).

- Indicate on his or her petition that she has received the requisite counseling.

and

- File a Certificate of Completion of Counseling with his or her petition indicating that such is the case.

11 U.S.C. § 109(h)(1).

If the debtor is not exempt from obtaining credit counseling under Paragraph 109(h)(2) or (4), and the debtor does not comply with the requirement set forth in Paragraph 109(h)(1), then, in order to be eligible to file a petition, the debtor must:

- Indicate on the petition that the debtor is eligible for a waiver on the basis of exigent circumstances;

and

- File, with his or her petition, a Certificate in Support of Temporary Waiver of Completion of Counseling that:

(I) describes exigent circumstances that merit a waiver of the requirement of Section 109(h)(1), and

(II) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain such counseling during the 5-day period beginning on the date on which the debtor made that request.

109(h)(3). If the debtor is not exempt from obtaining credit counseling under Paragraph 109(h)(2) or (4), and the debtor does not comply with Paragraph 109(h)(3), then the debtor is not eligible to file a petition and the case must be dismissed.

*Discussion*⁵

A. Timing of the Debtor's Certificate in Support of Temporary Waiver of Completion of Counseling.

The debtor did not file his Certificate in Support of Temporary Waiver of Completion of Counseling until December 29, 2005, some forty-four days after he filed his petition. The certificate, if satisfactory to the court, only extends the time to obtain counseling by 30 days. When a certificate is filed forty-four days after the petition is filed, the requested extension of time will have previously terminated. Thus, the certificate can be of no benefit to the debtor. The late filing of the Certificate in Support of Temporary Waiver of Completion of Counseling is sufficient grounds to deny the request for a waiver and dismiss this case.

Furthermore, this Court can think of no instance in which a debtor would not be able to file a Certificate in Support of Temporary Waiver of Completion of Counseling if the required circumstances have occurred. A debtor need only make two statements: one describing the exigent circumstances and one certifying that he or she was told that counseling would not be available within five days. There is no excuse, there will never be an excuse, for a debtor failing to file a Certificate in Support of Temporary Waiver of Completion of Counseling with his or her petition when it is appropriate to do so.

On this basis alone, this case should be dismissed. This court has, however, in an attempt to accommodate the Debtor's counsel, permitted a number of his other cases to proceed when the debtor filed the Certificate in Support of Temporary Waiver of Completion of

⁵ At the hearing on this matter, a briefing schedule was set that gave the Debtor until January 24, 2006, to file a brief in support of his arguments. The Debtor declined to do so. The court will consider arguments made by the Debtor's counsel in his response to the opposition of the chapter 13 trustee in other cases with similar facts.

Counseling late.⁶ And so, this case will not be dismissed for this reason.

B. The Merits of the Debtor's Certificate in Support of Temporary Waiver of Completion of Counseling.

Exigent Circumstances. A circumstance that is exigent is one that requires immediate action. The Debtor asserts that he was faced with the following exigent circumstances: (1) his checking account is consistently overdrawn, (2) two writs of garnishment have issued against him, (3) he faces potential liens against his house, and (4) he has a wife and two children to support. None of these circumstances constitutes exigent circumstances that merit a waiver of credit counseling. They are circumstances, but they are neither exigent and nor do they merit a waiver of credit counseling.

In this analysis, the immediate action that is required is the filing of a bankruptcy petition. The filing of a petition will do nothing to remedy the debtor's overdrawn bank account. Nor will it directly aid the debtor in supporting his family. Nor does the fact that the debtor faces potential liens constitute exigent circumstances. A lien requires further steps by the creditor before the debtor will be deprived of property, during which time the debtor may take steps, including the filing of a petition, to protect his property. The possibility of future liens does not constitute exigent circumstances. The existence of writs of garnishment will rarely constitute exigent circumstances. When a writ of garnishment issues, a debtor is given notice to respond before it becomes effective.

⁶ The Amended Bankruptcy Code has been effective for more than three months. Counsel for the Debtor has filed eight or more petitions that do not comply with the requirements of Section 109(h). This court is aware of only one other case in which a debtor had difficulty in complying with Section 109(h). In that case, a pro se debtor used an old petition form that did not have boxes to indicate whether the debtor had complied with the requirements of Section 109(h).

This court has further reason to believe that the debtor's reasons are not exigent. In this case, the debtor waited 20 days after meeting with counsel before filing his petition. If the financial pressures that the debtor faced required immediate action, the debtor would not have waited twenty days after speaking with his attorney before he filed his petition.

The Debtor argues that the information supporting his argument that he faced exigent circumstances at the time of his filing "are contained within the four corners of the petition itself". This fact would be wholly insufficient to receive a temporary waiver of the counseling requirement, even if were true. The code clearly requires the debtor to file a certification describing the exigent circumstances. A vague reference to the four corners of the petition will not suffice.

Even if the debtor's reasons were meritorious, the court would dismiss this case. Any debtor who wishes to obtain a waiver pursuant to Section 109(h)(3) *must* file a certificate *with his or her petition*, describing the exigent circumstances that merit a waiver and stating that the debtor could not obtain counseling pre-petition during the five-day period beginning on the date on which he or she first attempted to obtain such counseling. The debtor waited forty-four days after filing his petition before he filed a Certificate in Support of Temporary Waiver of Completion of Counseling.

Availability of Credit Counseling. A debtor, as part of his certification in support of a waiver must certify that he or she "requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph [109(h)](1) during the 5-day period beginning on the date on which the debtor made that request." An individual who fails to provide this certification is not eligible to be a

debtor in bankruptcy. See In re Watson, 332 B.R. 740, 745-746 (Bankr. E.D.Va. 2005). The Debtor certifies that he “encountered substantial difficulties in obtaining credit counseling” and that he was given a list of “counselors on October 26, 2005 when he was interviewed, but was unable to obtain credit counseling until after filing.” The debtor has not certified that he made a request of a credit counseling agency and was not able to get counseling within five days. The debtor has not certified the circumstances as required by Section 109(h)(3). This case could be dismissed on this basis alone.

Debtor’s Collateral Arguments. The Debtor argues that an act that must be done in five days is, by definition, not exigent because “the five day time period for obtaining credit counseling” is not “consistent with exigent circumstances”. The argument is without merit. The problem with the argument is that it incorrectly assumes that the time characteristic applied to the exigent circumstances requirement should also apply to the counseling requirement.

The Bankruptcy Code requires the occurrence of two separate and distinct events before the temporary waiver of the credit counseling may be granted under Paragraph 109(h)(3). First, there must be exigent circumstances, that is, the debtor must have an immediate need to file his or her bankruptcy petition. Second, the debtor must have been unable to obtain credit counseling during the five day period beginning on the date that the debtor first attempted to do so. These are two separate requirements with two separate time characteristics. Because those time constraints concern two separate requirements, they cannot be contradictory.

Consequently, it is quite possible for a debtor to meet one requirement, but not the other. For example, if the debtor is facing an exigent circumstance on the date that he or she first attempts to obtain counseling, but is able to obtain credit counseling within five days, then a

waiver is not in order because both requirements are not met. It is possible that some event may occur during the five day period that adversely impacts the debtors financial condition, thus preventing the debtor from filing his or her petition before the event occurs. This circumstance, though potentially harmful to a debtor's financial condition, does not excuse a debtor from complying with the provisions of Section 109(h) before becoming eligible to file a petition.

The Debtor also argues that the code discriminates against individuals in that corporations and partnerships are not required to obtain credit counseling. The Debtor cites no authority that concludes that all laws must treat individuals in the same manner as corporations, partnerships and other forms of business organization. The Debtor's argument has been considered and rejected by at least one court. See Watson 332 B.R. at 746-747.

The debtor also asserts, without argument or citation, that the cost of credit counseling imposes financial hardship on individual debtors. This argument proves too much. If the imposition of a fee for counseling is somehow unconstitutional, then so are bankruptcy filing fees. But filing fees are not unconstitutional. See U.S. v. Kras, 409 U.S. 434 (1973) (The statutory requirement that filing fees must be paid as condition precedent to obtaining a discharge in bankruptcy has a rational basis and does not deny indigents equal protection of the laws.) The requirement that debtors pay a fee for counseling does not impose an undue financial hardship on debtors.

Conclusion

As of January 4, 2006, the date of the hearing on this matter, the Debtor had not filed a Certificate of Completion of Counseling with the Clerk of the Court. This date is 50 days after the date that the Debtor filed his petition. Such a certificate may be filed with 30 days of the

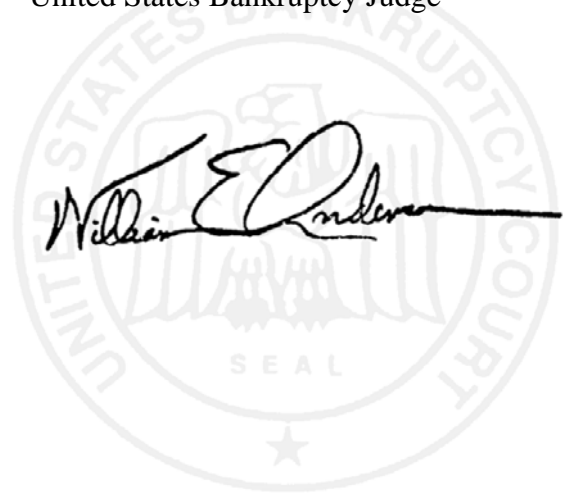
date of petition under certain circumstances. This time period may be extended by the Court from 30 days to 45 days. The last date that the Debtor could possibly have complied with the requirement of Section 109(h)(2) has passed.

Accordingly, this case shall be dismissed, without prejudice.

Upon entry of this memorandum, the Clerk shall forward a copy to the chapter 13 trustee, Michael P. Regan, counsel for the debtors, and the United States Trustee.

Entered on this 24th day of February, 2006.

William E. Anderson
United States Bankruptcy Judge



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In re BARRY LAMONT RUFFIN,)	Case No. 05-65085
)	
Debtor.)	
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ORDER

For the reasons stated in the accompanying memorandum, this case shall be and hereby is dismissed without prejudice.

So ORDERED.

Upon entry of this order, the Clerk shall forward a copy to the chapter 13 trustee, Michael P. Regan, counsel for the debtors, and the United States Trustee.

Entered on this 24th day of February, 2006.



William E. Anderson
United States Bankruptcy Judge

